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LIMITATION OF THE AMOUNT ONE MAY TAKE BY DESCENT OR BY WILL.*

We speak of the machinery of government, and the figure is not an inapt one. If constructed upon one plan, it is constantly working towards the most happy results to its people; if upon another, its tendencies are to produce hardship, discontent and finally must be broken up to give place to something better. Such has been the history of progress from the first institution of government to the present day.

As in the factory, so in the machinery of the government, there are great centers of power—main shafts and pulleys that drive all the rest. There are laws which are so fundamental in their nature that sooner or later they make or break all the rest. Of this nature are the laws of property, and most far reaching among these are the laws concerning the transmission of property by descent and by will.

It is hardly possible to consider the history of civilization without discovering that the opinions, habits and aspirations of the people, and even the form of government, its strength and durability, have for the most part been determined by their notions concerning property, its ownership and use.

The mention of a few leading types will be sufficient to make this plain. We may begin with the earliest, most simple and rudest of these types—the nomads. Their opinions, habits, aspirations and form of government go with their notions of property, as cause and effect go together. The nomad recognizes property only in such things as he can take about with him from place to place. He does not recognize property in land. One place is as much his as another. Land is as free to him as the air or water; therefore he moves from place to place as his caprice may dictate, or he may find game or spoil more abundant. He has no home, and knows none of the aspirations or sentiments that belong

* Read at the World's Congress of Jurisprudence and Law Reform, at Chicago, August 7, 1893.

to that "dearest spot on earth." He knows of none of the wealth that is stored up in the soil and has no dealings with it. His government is as rude as his mode of life. It is necessarily tribal; each tribe keeping every other tribe as far away from it as possible that it may be surrounded with extensive wastes.

Another type is found almost universally among the Aryan races. It represents an advance in civilization over the nomadic, and occurs when the tribes having come, most likely through necessity, to recognize the advantages of ownership in lands, settled down upon them for the purposes of abode and agriculture. This ownership was at first, and quite naturally so, in the community forming the particular settlement. And this form of ownership gave rise to new habits and to aspirations peculiar to itself. A certain portion of the land was divided into small house or home lots which were assigned to the respective families, the rest was again divided into tillable, pasture and waste lands.

The pasture and waste lands were used in common. The tillable lands were allotted from time to time, most commonly every year, among the families, each family enjoying the product of its own labor. The house or home lot was the property of the family as a whole, under the control of the head of the family whose authority was absolute. There was no power of disposal by will and neither could he or the family as a whole or any member of it dispose of his right in the homestead or in any of the common property, or substitute another person in his place without the consent of the community. The heads of the families managed the common affairs of their community in assemblies of their own; and their regulations were carried out by head men of their own choosing. These village communities had little sympathy with other communities. There was ordinarily very little intercourse between them. They had few common interests, except such as grew out of the aggressions of a common enemy. Of the products of the earth and of cattle, one family by greater diligence and frugality might surround itself with somewhat more comforts than another, and the

superior influence of the head of the family might secure to it an advantage in the allotments. But of the enduring wealth which was contained in the soil there was no buying or selling, no accumulation in the hands of one or of a few, to the exclusion of others. Thus a condition of equality was steadily maintained, and this equality in its turn maintained democratic methods in the management of their governmental affairs, such as they had.

By some, this arrangement is considered an ideal one. But whether it was or not, must depend upon the standard of ideals. It was not favorable to individual independence or enterprise. It made very slow progress in the attainments and comforts of civilization.

These communities were an easy prey to their warlike and covetous neighbors, but the most detrimental consequences have befallen them through the designs of their own ambitious leaders. There is a marked uniformity in the history of these communities among whatever races they have existed; at first petty contests between single communities leading to more general wars; combinations under favorite leaders; the establishment of kingdoms and empires; the division of territory among the leaders upon military considerations, to secure greater efficiency and economy in military organization. At the outset the chief or leader was merely the foremost among a number of free and equal proprietors by whom he was chosen. In the course of time he was converted into the hereditary lord and assumed to be the proprietor of the land and the cultivators his subjects, bound to follow him in war and render to him a return in service, in kind or in money, and finally became their immediate landlord, they paying him rent.

I do not contend that the same course of events has occurred among every people. On the contrary many variations have occurred; but when we look closely into the matter it will be found that these variations have resulted from the extent of the proprietorship in the land assumed by the leaders or chiefs, and the particular regulations governing their transmission from one person to another. But all past history

shows that communal ownership of lands lacks the vigor necessary to mental and material progress, or to resist the encroachments and assumptions of the strong over the weak, and that the equality which it produces is upon an exceedingly low plain.

It would be very interesting to trace the history of the law of property down through the ages and to show the connection between the notions of property as expressed in customs or in statutes, or in both, with the liberties and happiness or misery of the people—the social conditions; but the time allotted to me will not admit of so extended a paper. The following table showing the ownership of land at the present time in nine of the foremost nations of the world will furnish what I shall for convenience call my text :

COUNTRIES.	Popula- tion.	Cultivated Million Acres.	Uncultivated Million Acres.	Acres.	Owners.	Average Per Estate.	Average Per Owner.	Ratio of Owners. One in
U. Kingdom.....	38,200,000	48	30	78,000,000	180,000	390	433	212
France	38,800,000	90	41	131,000,000	3,226,000	32	40	12
Germany	48,600,000	65	68	133,000,000	2,436,000	37	54	20
Russia.....	92,000,000	345	899	1,244,000,000	11,336,000	31	109	8
Austria	40,000,000	73	80	153,000,000	6,150,000	20	25	6
Italy.....	30,300,000	27	44	71,000,000	1,265,000	36	55	23
Sweden.....	4,800,000	12	89	101,000,000	194,000	300	517	24
Norway.....	2,000,000	3	74	77,000,000	75,000	200	1026	26
Denmark.....	2,100,000	7	2	9,000,000	71,000	115	128	30

We find here wide differences in the distribution of the land of different countries. Take for example the United Kingdom (England, Ireland and Scotland) and compare it with France. The population of the two countries is about equal. France has a little less than twice as much land as the United Kingdom. The ownership of its 131,000,000 acres is distributed among 3,226,000 owners, an average of 40 acres to each owner. One in twelve of the population owns land. The ownership of the United Kingdom's 78,000,000 acres is vested in 180,000 persons, an average of 433 acres to each owner. One in 212 of the population owns land.

To go more into particulars, we find that in France there

are about 2,000,000 properties under 12 acres; 1,000,000 between 12 and 25 acres, while there are only 150,000 above 100 acres. Of the whole population there are 1,750,000 who cultivate their own land with their own hands and who are not tenants; 850,000 who cultivate as tenants, and only 57,000 who cultivate by aid of a foreman or steward. In the United Kingdom 34 persons own 6,211,000 acres—an average of 183,000 acres each; 841 persons own 3,156,000—an average of 3,760 acres each. The balance is distributed among 179,000 owners—an average of 330 acres each. The Duke of Sutherland is said to own 1,358,000 acres; Lord Middleton, 1,206,000 acres; Matheson, 627,000, and so on down to the Duke of Hamilton, the smallest in the first list (that of 34), who owns only 157,000 acres. There are Marquises, Dukes, Lords and Earls, each of whom receives over \$500,000 *per annum* rentals. The Duke of Norfolk receives \$1,140,000. Of tenant farmers there are in Great Britain 561,000; in Ireland 600,000. About 400,000 of those in Great Britain and about 500,000 of those in Ireland occupy less than 15 acres of cultivated soil. The average size of the remaining holdings in Great Britain is 160 acres, and in Ireland 75 acres.

What has produced these wide differences? They are certainly not to be traced to a difference in the earning capacity of the individuals making up the two nations. No one would think of crediting the Duke of Sutherland, for instance, with having earned his 1,358,000 acres by his own skill and industry. Neither is to be supposed that all or nearly all the land-owners of France, be they large or small, have themselves earned their respective holdings.

The condition of things which we find in the two countries has been brought about principally by the operation of their property laws, most potent among which are those regulating transmission by descent, by will and through settlements. And among these, again, the most potent is the law of descent which is supposed to express the settled policy of the state, so far at least as concerns the disposition of property. The law of descent has a sort of automatic power. It needs not to be invoked; it acts of its own accord, bestow-

ing its benefits upon its favorites, whether they will or not. It is self-executing.

In France, property descends to the next of kin very much as in this country, and is thus subjected to the policy of frequent division. There are some restraints upon testamentary disposition. The English policy is to build up great estates, and, therefore, in England the land descends to the eldest son, to the exclusion of the other children. Fortunately, this rule does not apply in cases where the deceased leaves only daughters, nor in any case to personalty, and these exceptions have a powerful effect in retarding the absorbing tendency of the rule of primogeniture. But this beneficent effect is itself restrained by the practice of entailment. I need not stop here to describe that practice. It is sufficient to say that its tendency is in the same direction as primogeniture—viz., to build up and keep together large estates—and it derives its moral support from that rule.

These two rules of descent, viz., that under which the next of kin takes equally and that where one takes to the exclusion of all the rest, may be regarded as representative. They represent the two clearly opposite policies of the foremost nations in the progress of civilization.

Thus far it has been my endeavor to hold your attention to the distribution of property and to those laws that play the most important part in bringing it about, without considering the effect of this distribution upon social conditions. And indeed it is hardly necessary that I should do so; the whole earthly career of the human race is bound up in the matter of distribution of property; all potencies for good or for evil; all joys and all miseries.

De Tocqueville, speaking of the laws of descent, says: "Through their means man acquires a kind of preternatural power over the future lot of his fellow creatures. When the legislature has once regulated the law of inheritance he may rest from his labors. The machine once put in motion will go on for ages and advance as if self-guided toward a given point. When framed in one particular manner the law unites, draws together and vests property in a few hands; it causes aris-

ocracy, so to speak, to spring from the ground. If framed on opposite principles its action is still more rapid, it divides, distributes and disperses both property and power. It goes on of its own force grinding to powder every obstacle in its way."

Besides the direct effect which it has upon the property and persons immediately concerned, it has an influence in moulding the sentiments, opinions, habits and aspirations of the whole people, and to some extent determines their avocations. It builds up monarchy and privileged classes, or it establishes democracy and equality and puts monarchy out of the question.

The policy of this country as expressed by Chancellor Kent, "is to allow a free circulation of property by the abolition of perpetuities, entailments, the claims of primogeniture and all inequalities of descent; thus preserving a proper equilibrium and dissipating the mounds of property as fast as they accumulate."

The laws of descent are quite uniform throughout the United States, and devolve the property of intestates upon the next of kin without regard to the size of the estate or the number of the next of kin. And, although they frequently result in carrying a large estate to one person and dividing a small one among many, they have upon the whole proved exceeingly satisfactory until quite lately. I cannot say so much of the law of wills, which allows one to take his property out of the operation of the law of descent enacted by the State, and to subject it, so to speak, to a law of his own making—thus projecting himself beyond the limits of nature, far into the future.

The question is, are these laws well enough as they stand to-day, or can they be changed for the better, and what changes does enlightened policy suggest. That they fall short of producing that "proper equilibrium," by the dissipation of the mounds of property, that they were originally designed to do; that they have not kept up with the facilities for amassing wealth, is shown by the numerous large estates kept together and transmitted from one generation to another. They were, perhaps, well enough when it was of rare occurrence that a

man accumulated a million of dollars in a long life of successful business, but now in this age of invention, steam and lighting, when the possibilities of amassing wealth are almost limitless; when one may give personal and momentary direction to his agencies scattered over the civilized world, without moving from his desk, and if he possess the requisite ability and credit, control the markets of the world, the conditions are altogether different and call for a corresponding change in the laws of property. Mr. Morris, in his able *Historical Review of Civilization*, says: "The growth of private fortunes is increasing to an extent that has in it something alarming. Sixty years ago Stephen Girard was looked upon as a prodigy of wealth with his less than eight million dollars. To-day there are hundreds in America much richer than this, and the highest point in riches has mounted to two hundred millions. This indeed is not out of accordance with the immense increase in public wealth within the present century, particularly in the United States, whose wealth in 1889 has been estimated at over \$60,000,000,000; more than the wealth of the whole world at the middle of the eighteenth century. The increase alone since 1880 is said to be greater than the total wealth of any of the other nations, if we except the five richest. Yet, however, great may be this increase, the growing inequality in the distribution is the reverse of satisfactory, and if this should go on at an equally rapid rate during the coming century, it can scarcely fail to lead to momentous consequences. The bulk of the world's wealth, in such a case, might fall into few hands to whom all the rest of mankind would sink into industrial subjection; the sword king of the past being replaced by the money king of the future; the autocrat of old, governed nations through his control by force of the property and persons of his subjects and his personal authority over the laws. The autocrat of the future may gain a similar power through his control of industry; his purchase of legislatures and the issue of his private edicts under the disguise of parliamentary enactments. This is the case in some measure at present. It may become the case in a far greater measure in the future, though there can scarcely be a question it will find

its natural limitation in a revolt of the people under any too heavy pressure of the autocratic hand."

The growing discontent in this country as well as the countries of Europe, and the fact that the social inequalities complained of are attributed to the inequalities in the distribution of property, are not only ominous but suggestive of the remedy.

In advocating a change in the laws of descent and of wills so as to limit the amount one may take by descent or will, with a view to bringing about a greater diffusion of property, I do not wish to be understood as contending that such a limitation would be a cure-all or, indeed, in itself amount to an ample remedy. The most that I shall claim for it is that it would be in the right direction, and have a powerful effect to remedy the evils resulting from the tendency to cumulations of the wealth of the country into few hands, and thus hardening the lines of the many.

Just what the limitation should be, or in just what way it should be applied, I am not prepared to state; nor is it necessary that I should state either. Most likely if we were all agreed upon the propriety of some limitation, there would be a wide difference of views as to amounts and as to manner. These details are not now important, except, perhaps, by way of illustration. And by way of illustration let us suppose a rule and see how it would work in a given case. Let us suppose that as to the smaller estates, say those under \$500,000, we let the law stand as now, so far as it relates to the children and surviving wife or husband of the deceased. When it exceeds that amount, and as to others than children and surviving wife or husband, we make the following limitations: A child, wife or husband may not take by will or descent from the same person to exceed \$500,000, and any other person not to exceed \$100,000. When the estate exceeds the amount limited to the heirs in the first degree of kinship, the overplus to go to those in the next degree subject to the limitation, and so on until the estate is exhausted. Now, let us suppose that the deceased leaves an estate amounting to \$1,000,000 and one son; he is in the first degree of kinship, and three persons

in the second degree, say brothers, and ten in the third, say nephews and nieces. Under this rule the son would take \$500,000; the three brothers each \$100,000, and the remaining \$200,000 would be divided in equal shares among the ten nephews and nieces, giving to them \$20,000 apiece. You see I would be very liberal with children and with surviving wife or husband in recognition of the natural sympathies in their behalf; and I am not sure but what I would so change the law as to put it out of the power of a parent by will to cut off a child altogether, as it is now, in Illinois, out of the power of a husband or wife to cut off the survivor. It probably would be best not to limit the amount one might give to charitable and educational purposes. Should the heirs run out before the estate is exhausted, the overplus might go to the State as it does now in default of heirs, or, what would be better, let it go into the school fund.

In the case supposed, fourteen persons would be made happy and given a good start in the world, instead of one person taking it all, as would be the case as the law now stands. And all the beneficiaries are kinsmen of the intestate, any one of whom might, as the law now stands, take the whole estate, the others being out of the way. While I would thus continue the high favor in which the law holds the relatives of the deceased, upon a broader law of sympathies among kinsmen, I would at the same time subject it to limitations dictated by sound public policy.

I do not believe in a successive or inheritance tax, or any other device by which wealth is to be turned over to the state, as a prevention of the evils resulting from excessive cumulation in few hands. It would take that much property out of reach of competition and individual enterprise, and build up an official class quite as objectionable as any other class. The true policy is to keep the wealth in the hands of the people, and in the hands of as many of the people as possible. Let it be so free to acquisition, that every one by industry and the exercise of fair ability may possess himself of a reasonable share of it. I would let him do as well for himself as he can, and enjoy the fruits of his labor as long as he lives.

Is it objected that, after all, the distribution of property through inheritance would be too slow a process ; let us see. It is stated upon the best authority that of the \$47,000,000,000, the total wealth of the United Kingdom, \$940,000,000, or one-fiftieth of the whole, changes hands by reason of the death of the holders each year ; so that the entire wealth of that Kingdom changes hands, through the operation of the law of descent and of wills and settlements, on an average once every fifty years. The same thing no doubt takes place in this country. At that rate, \$1,500,000,000 changes hands every year in this country in the same way.

Is it within the power of the legislature to make such a change in our laws ? Would it not interfere with vested rights ? My answer is that the laws of descent and of wills are creatures of the legislature, and may be changed at the pleasure of the legislature. There is no constitutional restraint or recognized natural right to the contrary. What they shall be is a matter of public policy, and this is and always has been the basis upon which they proceed. Mr. Blackstone says : “ Wills and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal law, and accordingly are in all respects regulated by them, every distinct country having different ceremonies and requisites to make a testament completely valid. Neither can anything vary more than the right of inheritance under different national establishments.” He claims that the law of nature suggests that, on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society.

Mr. Proffatt, in his work on wills, says : “ It is claimed that the *jus disponendi* is a necessary incident of property, an inseparable quality ; but if by the term we understand a right of disposal while a man lives, we can admit it belongs to ownership ; but it is quite a different thing when a man ceases to live, for then, naturally, he ceases to have dominion, and if he have a natural right to dispose of his goods for a short time after death, why not for a million years ? It is not a natural

inherent right of the individual to dispose of his property after his decease; it is no more or less than a right given by positive law—a right which is founded on convenience and concession.”

All writers admit the wisdom of recognizing the claims of affinity and consanguinity as being in accord with the sympathies and reason of all mankind. But in the recognition of their claims by positive law, the greatest diversity occurs as to the relationship of the persons admitted to share the property of the deceased. Mr. Blackstone says: “In England this diversity is carried to such a length as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state.” Illinois is an example of the exercise of the power to limit testamentary disposition. A husband or wife cannot by will deprive the other of a certain share which the statute of descent gives to the survivor; thus when the decedent leaves no child or descendants of a child, the surviving husband or wife will take one-half the real and personal estate by descent, any will to the contrary notwithstanding.

A limitation, such as I have suggested, would not, in principle, be a new departure in this country. It would simply be moving forward the American policy on the same line as stated by Chancellor Kent in the language given above. In other words, it would be a readjustment of the machinery to the changed condition of things. It is a serious question if the safety of property itself does not lie in this direction. We must bear in mind that majorities make and unmake laws in this country. Let us contemplate what a state of things might be brought about if those who have no property or so little that they are not interested on its side, were permanently in the majority. What they might do would depend upon the intensity of their feelings, and this again would depend upon the severity of the evils which should arouse their resentment. The security of property rights depends upon property being as democratic as the form of government. So long as the majorities are on the side of property there need be no fear of

communism, nihilism or anarchism. These have all been tried in their turn and have gone down before the inspiration and vigor of individual ownership protected by the strong arm of well-organized government. As Mr. Blackstone says: "There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and despotic dominion which one man claims and exercises over external things of the world in total exclusion of the rights of any other individual in the universe." Individual ownership appeals to the highest earthly aspirations and calls forth the most profound thought and energy of man. It is consistent with the utmost simplicity in governmental machinery, inasmuch as it may leave in the hands of the individual all matters that pertain to his welfare, except such things as are of such a general nature that they can only be performed by a representative agency, such as making general rules of conduct and enforcing them; the common defence and intercourse with other states. It makes the best use of the gifts of nature and represents the greatest material progress and highest civilization that has been attained up to the present day. But it is still on trial, with many well-founded complaints made against it. This power of individual dominion must not be carried too far. While it may be well enough that one be allowed to acquire and enjoy to the utmost of his abilities during life, there must be a reasonable limit placed upon his power to project his domination beyond life; not as a matter of sentiment or absolute right, but as a matter of public policy. No policy will long endure in a republic which is continually withdrawing from circulation in increasing magnitude large masses of the wealth of the country.

The objection which first strikes the mind is, will not such a limitation dampen enterprise. On the contrary, it seems to me that it will promote enterprise. The tendency of large inheritances is to withdraw wealth from the avenues of business. If they were so reduced in amount and so dispersed as to furnish a good beginning to many, enterprise would be encouraged. The difference is between having the capital in the hands of many who have their fortunes to make, or having it all in

the hands of one who can have nothing more to wish for. It is the difference between storing away money in safety-deposit vaults and putting it in circulation. The stock of available capital should be as large as possible; sufficient, if possible, to call out the ambition of every member of the community. So far as the law has any agency in the matter, I would have it as impartial as possible. I would have its tendency always in the direction of equality of opportunity. Equality as to the amount of property possessed, is not in accordance with the economies of our nature. To use the elegant language of Chancellor Kent, "a state of equality as to property is impossible to be maintained, for it is against the law of our nature, and if it could be reduced to practice, it would place the human race in the state of tasteless enjoyment and stupid inactivity which would degrade the mind and destroy the happiness of social life." Emulation is in accordance with our natural instincts, and when restrained within proper limits results in the best attainments.

Harvey B. Hurd.

Chicago, 1893.